

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

VANDELL JOHNSON, JR.,

Defendant and Appellant.

C067148

(Super. Ct. No.
SF111178B)

APPEAL from a judgment of the Superior Court of San Joaquin County, George J. Abdallah, Jr., Judge. Affirmed in part and reversed in part.

Stephen Gilbert, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vandell Johnson, Jr., and codefendant Rammel Barao were jointly charged with having murdered Juan Carlos

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, and IV of the Discussion.

Lorenzo in the course of robbing him (count 1) and with the robbery of Lorenzo (count 2) and Lorenzo's companion, Domingo Moyotl (count 3). Each count alleged that Barao personally used a firearm and that defendant was armed with a firearm. It was further alleged that defendant had three prior strike convictions, all of which were incurred in juvenile court, and that defendant had committed the instant offenses while being on bail for another offense.

In a joint trial by jury, defendant was acquitted of the murder and all lesser included offenses, but was found guilty of the two robberies; the armed enhancements were found not true. In a court trial, the court found the on-bail allegation true and purportedly found the three prior strike conviction allegations true.

Barao was acquitted of first degree murder and the two robbery counts, but was found guilty of second degree murder with personal use of a firearm.¹

Defendant was sentenced to 50 years to life in state prison for the robberies, and the on-bail enhancement was ordered to run concurrently with those terms.

On appeal, defendant contends (1) the evidence was insufficient to support his conviction of the robbery charged in count 2 (Lorenzo); (2) the strike priors must be stricken

¹ Barao was also found guilty of possession of a firearm by a convicted felon (count 4) and possession of ammunition by a convicted felon (count 5).

because he neither waived his right to a jury determination of their truth, nor did the trial judge find they were true;

(3) the on-bail enhancement finding must be reversed because he neither waived his right to a jury determination of its truth, nor was the evidence sufficient to support the true finding; and

(4) the prior strike findings must be stricken because he was not afforded a jury trial on their truth. We shall affirm defendant's convictions but remand for resentencing.

FACTS

People's Case

During the evening of February 28, 2009, defendant and Barao, accompanied by their girlfriends Chansarinna Uy and Desiree Ballestrasse,² walked from Barao's apartment on East Park Street to Bobadilla's Billiards to play pool. Also present at Bobadilla's were Lorenzo and Moyotl. Although Moyotl understood only a little English, the two groups struck up a conversation. Eventually the four men went into the parking lot and began discussing drugs. Moyotl heard someone say "cocaine," but he did not understand much more of the conversation.

After speaking for a short time, the four men got into Lorenzo's car -- Moyotl in the driver's seat, Lorenzo in the passenger seat, and defendant and codefendant Barao in the back seat. Defendant and Barao tried to give Moyotl directions, but

² At the time of trial, Ballestrasse had married Barao.

Moyotl had difficulty understanding so Lorenzo took over the driving. Defendant or Barao directed Lorenzo to a parking lot.

According to Moyotl, defendant got out of the car and walked toward the street, but then returned and stood by the driver's door. Moyotl saw Barao get out of the car, take a gun from his waistband and put it up his sleeve. As Barao and defendant were speaking with Lorenzo, Moyotl said to Lorenzo, "Let's go, let's go now." However, Lorenzo continued talking and then Barao shot Lorenzo in the head. Lorenzo's car rolled about 25 feet, hit a fence, and stopped.

Barao immediately walked away from the area, but defendant went to the passenger side of the car and demanded money from Moyotl. Moyotl gave defendant his wallet, and defendant gestured for Moyotl to get out of the car and leave. Moyotl walked away but looked back and saw defendant get into the front passenger seat of Lorenzo's car. As Moyotl walked he called the police, who met him at a Laundromat about two blocks away.

Police officers who responded to the Laundromat spoke with Moyotl, with whom they had difficulty communicating. Eventually, the officers learned of the shooting and found Lorenzo's car in the parking lot with Lorenzo still in it. Lorenzo's car stereo, which had been in the dashboard prior to the shooting, was missing and the connecting wires were hanging from the center console. Lorenzo was still alive and was transported to a hospital; however, a few days later he died. The cause of death was a single gunshot wound to the head.

Defense Case

Defendant testified, confirming meeting Lorenzo and Moyotl at the pool hall. Defendant claimed it was Lorenzo who was selling drugs and that he, who also sold drugs, intended to buy drugs from Lorenzo. Lorenzo set up the buy and drove them to the parking lot where the drugs were to be delivered.

Fearing that he and Barao were being set up, defendant got out of Lorenzo's car and walked away. However, defendant heard Lorenzo speaking loudly to Barao, so he walked back to the car. While defendant and Barao were talking with Lorenzo, Barao suddenly pulled out a gun, which defendant did not know that Barao possessed. Lorenzo reached out of the driver's window for the gun, defendant heard the car's engine rev, and Barao then shot Lorenzo. Defendant fled because he was scared.

Defendant denied robbing or intending to rob either Lorenzo or Moyotl. When defendant later asked Barao what happened, the latter said that "the guy tried to run him over and then a shot went off."

Both Uy and Ballestrasse were outside the East Park Street apartment when defendant returned, walking. Defendant was not carrying anything.

DISCUSSION

I

Defendant contends the evidence is insufficient to support his conviction for the robbery of Lorenzo. He argues that the record fails to contain substantial evidence to prove either that he took the stereo from Lorenzo's car or that he obtained

the stereo by subjecting Lorenzo to force or fear. We reject both positions.

"In reviewing a challenge to the sufficiency of the evidence, 'we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 917.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Thus, the People must not only prove it was the defendant who feloniously took the property from the immediate presence of the victim, but also that he or she accomplished the taking by the use of force or fear against the victim.

Substantial Evidence Proves Defendant Took the Stereo

As defendant sees it, the evidence is insufficient to establish that it was he who stole the stereo from Lorenzo's car because nobody "saw [him] take the stereo or carry it off"; a visitor at a home across from the parking lot saw defendant walking away from the parking lot, and defendant was not carrying anything at that time; neither Uy nor Ballestrasse saw defendant carrying anything when he arrived on foot at the apartment; and finally, the time between Moyotl's last seeing defendant and the arrival of the police was sufficient time for someone else to have taken the stereo. The argument is not persuasive.

While it is true there was no direct evidence anyone saw defendant take the stereo or carry it off, there was ample circumstantial evidence that he did so. Defendant and Barao spoke with Lorenzo and Moyotl in the parking lot of the pool hall about a drug deal; it might have been defendant who directed Lorenzo to drive to the other parking lot; defendant was at Barao's side when the latter suddenly pulled a gun and shot Lorenzo; the stereo was in the dashboard of Lorenzo's car when Lorenzo was shot; immediately after the shooting, defendant robbed Moyotl of his wallet; as Moyotl was leaving the scene, he saw defendant get into the passenger side of Lorenzo's car; and there was a 15- to 20-minute period that elapsed between the shooting of Lorenzo and the police finding Lorenzo's car, enough time for Lorenzo to have taken the stereo. Although it was also enough time for someone else to have taken the stereo, there was

absolutely no evidence whatsoever that anyone else actually did so.

Moreover, defendant's assertion that an uninterested witness, one Zachary Trigg, saw defendant walking away from Lorenzo's car empty-handed is not an accurate description of Trigg's testimony. Trigg testified that he was at his brother's house next to the parking lot where Lorenzo was shot when he heard a gunshot. Fifteen minutes later he saw an individual, who was not carrying anything, walk by the front of the residence, but he could only tell that it was a male who "had [a] tan." When Trigg was asked by defendant's counsel whether the individual "look[ed] like an African American like these two [defendants]," he responded "No." Such testimony is a far cry from defendant's claim that Trigg testified that after the shooting he saw defendant walking away from Lorenzo's car and defendant was not carrying anything. The only individuals who testified to defendant's arriving empty-handed at the East Park Street apartment were Uy and Ballestrasse, whose credibility was in question since they were romantically involved with defendant and Barao, respectively.

In sum, based on evidence that defendant discussed drugs with Lorenzo in the pool hall parking lot, might have been the one who directed Lorenzo to drive to a parking lot, stood next to Barao when the latter shot Lorenzo, robbed Moyotl immediately thereafter, and entered the passenger side of Lorenzo's vehicle as Moyotl left the scene, the jury could reasonably infer that

it was defendant who took Lorenzo's stereo. We reject defendant's claim to the contrary.

Substantial Evidence Proves Defendant Took the Stereo by Force

"[T]he act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal in order to satisfy the requirement of section 20:^[3] if the larcenous purpose does not arise until after the force has been used against the victim, there is no 'joint operation of act and intent' necessary to constitute robbery," and the offense is theft. (*People v. Green* (1980) 27 Cal.3d 1, 54, overruled on a different point in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

Defendant argues that because the only force applied to Lorenzo was by Barao, and because the jury acquitted Barao of the robbery charges, the jury must have found that the shooting was not for the purpose of stealing from Lorenzo. Without Barao harboring an intent to steal at the time of the shooting, defendant continues, the only application of force against Lorenzo was not in furtherance of the robbery, and therefore, he is guilty only of theft. Defendant is wrong.

"[A]n aider and abettor's mens rea is personal, . . . it may be different than the direct perpetrator's: 'guilt is based on a combination of the direct perpetrator's acts and the aider

³ Penal Code section 20 states: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

and abettor's own acts and own mental state' [citation]; an aider and abettor's 'mental state is [his or] her own; [he or] she is liable for [his or] her mens rea, not the other person's' [citation]; aider and abettor liability is 'premised on the combined acts of all the principals, but on the aider and abettor's own mens rea' [citation]." (*People v. Nero* (2010) 181 Cal.App.4th 504, 514; internal citations are to *People v. McCoy* (2001) 25 Cal.4th 1111.)

The jury was instructed that to find defendant guilty of robbery it must be proven, among other things, that "[w]hen the defendant used force or fear to take the property, he intended to deprive the owner of it permanently" and that "[t]he defendant's intent to take the property must have been formed before or during the time he used force or fear."

Therefore, by convicting defendant, the jury must have found that defendant's intent to take Lorenzo's property was formed "before or during the time" force was used on Lorenzo. That Barao's shooting of Lorenzo may have been for a reason other than robbing Lorenzo, i.e., a different mental state from that of defendant, is of no aid to defendant because defendant's criminal liability is based on his own mental state, which was to rob Lorenzo.

Consequently, the evidence substantially supports defendant's vicarious use of force on Lorenzo in the taking of the latter's car stereo.

II

Defendant contends that because he never waived his right to have a jury determine the truth of the three alleged strike priors and because the court never found the allegations of those priors true, they must be stricken and he must be resentenced. He further contends that upon resentencing, the court is not permitted to redetermine the strikes. We agree with defendant that the trial court failed to actually find the prior convictions valid, and that he must be resentenced. However, we disagree that the strikes cannot be proven on remand. Consequently, we shall vacate the sentence and remand the matter for further proceedings.⁴

Prior to the presentation of evidence, the trial court granted defendant's motion to bifurcate the trial of the prior convictions and the on-bail enhancement. On September 3, 2010, after the jury had returned its verdicts, the court dismissed the jury. After the jury left the courtroom, defense counsel reminded the court that "we still need to do the issue of priors." It was agreed the matter, including defendant's formal waiver of a jury trial, would be continued to October 18.

On October 18, 2010, counsel informed the court that he was prepared to proceed on the People's portion of the trial on the prior convictions; however, because counsel had been led to believe by defendant and defendant's juvenile court counsel that

⁴ Our resolution of this issue makes it unnecessary for us to address defendant's lack of jury waiver argument.

only one of the priors defendant had admitted in juvenile court was to be considered a strike, he needed time to investigate that issue. The court accepted the prosecutor's documentation on the validity of the priors (exhibit No. 87) and stated: "[L]et's do the following as to [exhibit No.] 87: I would rather see the briefs that [defense counsel] is going to be filing before I rule on whether I find that he suffered these prior serious felony convictions. I think that would be the better order in which to do this."

On January 11, 2011, the court called the case for the purposes of sentencing and a ruling on defendant's *Romero* motion.⁵ The court asked the prosecutor whether a hearing had been conducted on the alleged priors, and she responded: "Yes. And the Court has received those (referring to the documents contained in exhibit No. 87) and they were found true" Defendant's counsel reminded the court that the final resolution of the prior convictions had been continued for counsel to review the juvenile court proceedings to determine if the information he had received from defendant's juvenile court counsel -- that defendant had only admitted a single strike -- was correct. Counsel stated he had conducted that review and found the information he had been given was inaccurate, and his position now was that there were two strikes, "assuming the other appropriate documentation is before the Court." Counsel

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

then stated, "So that's the first thing I think we have to do." Counsel added that "should the strikes be found to be valid," the court would then move to sentencing and addressing defendant's *Romero* motion.

At this point, the court clerk noted that because the exhibits were received on October 18, 2010, she assumed the trial on the priors occurred that day. The court examined the minute order and observed that the minute order for October 18, 2010, did reflect that a hearing was conducted on the priors and they "were found to be true beyond a reasonable doubt at that time." The matter was not further discussed.

While the clerk's minutes for October 18, 2010, do reflect that the priors were found true on that date, the reporter's transcript is to the contrary. The reporter's transcript indisputably shows that although the validity of the priors was being considered on October 18, a final decision was to be made on a later date after the court had the opportunity to review counsel's position on whether defendant had admitted only one prior strike conviction. When, as here, the record is in conflict and cannot be harmonized, the part of the record will prevail which is entitled to greater credence. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Since the reporter's transcript sets forth the exact words used by the parties, it is the more credible document. Consequently, we conclude that no ruling on the priors was actually made on October 18, 2010.

"When . . . the trier of fact fails to make a finding the effect is the same as a finding of 'not true.' [Citation.]"

(*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440.) Because the court failed to make a finding on the truth of the priors, reversal of defendant's sentence is required.

The People attempt to avoid reversal, arguing the record shows that although defendant initially stated he wanted to examine the juvenile records more closely, he ultimately conceded the records reflected that he suffered two prior strikes. "Under the circumstances," the People conclude, "defense counsel's concession is the functional equivalent of a stipulation that [defendant]" suffered the prior strikes.

We do not so read the record. After counsel pointed out to the court that defendant's juvenile records did not comport with his having admitted only one strike, counsel stated: "So that . . . changed my position; based on my reading of the transcript there is in fact two strikes, *assuming the other appropriate documentation is before the Court.* [¶] So that's the first thing I think we have to do. [¶] Then we move to the sentencing issue" and the *Romero* motion. (Italics added.) While counsel recognized it was an uphill battle, he was not conceding the validity of the priors.

Consequently, we shall reverse the sentence and remand for further proceedings. On remand, the People are not prohibited from proceeding to prove the prior strike allegations.

(*People v. Jenkins* (2006) 140 Cal.App.4th 805, 814-815.)

III

Pursuant to Penal Code section 12022.1 (references to undesignated sections are to the Penal Code),⁶ defendant was charged with being on felony bail when he committed the offenses charged in the present case. At the hearing on the enhancement, defendant stipulated that when he committed the present offenses (secondary case), he was on felony bail in another case (primary case). Based upon the stipulation and supporting documents (People's exhibit No. 86), the court found the enhancement true and, at sentencing, imposed the mandatory two-year term to run concurrently with the two robbery sentences.

Defendant now contends the section 12022.1 enhancement must be stricken because (1) the evidence is insufficient to support the true finding since there was no proof that he had been convicted of the primary offense, and (2) he did not waive his right to a jury trial on the enhancement. The People respond that defendant is not entitled to a jury trial on the

⁶ Section 12022.1 provides, in pertinent part: "(a) For the purposes of this section only: [¶] (1) 'Primary offense' means a felony offense for which a person has been released from custody on bail or on his or her own recognizance [¶] (2) 'Secondary offense' means a felony offense alleged to have been committed while the person is released from custody for a primary offense. [¶] (b) Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court. [¶] (c) The enhancement allegation provided in subdivision (b) shall be pleaded in the information or indictment which alleges the secondary offense"

enhancement, but agree with defendant's insufficiency of the evidence argument.

We disagree with the parties that there was insufficient evidence to support the enhancement. However, we shall strike the two-year term because it was imposed concurrently rather than consecutively as expressly required by section 12022.1, subdivision (b).⁷ We further conclude that defendant is not entitled to a jury trial on the truth of the enhancement under either the federal or California Constitutions.

The Evidence Is Not Insufficient to Support the Enhancement

Defendant and the People argue the section 12022.1 enhancement must be stricken because there was no proof that defendant was convicted of the primary offense. However, conviction of the primary offense is not an element of a section 12022.1 enhancement. As explained in *People v. Smith* (2006) 142 Cal.App.4th 923, "Section 12022.1 does not make the defendant's conviction of the primary offense an element of the enhancement for the purpose of proving the enhancement. Instead, the statute only requires proof of conviction of the primary offense before the enhancement can be imposed. [Citations.] . . . [¶] . . . 'Whenever there is a conviction for the secondary offense and the enhancement is proved, and the person is sentenced on the secondary offense prior to the

⁷ We strike the punishment because the court, having imposed a concurrent term, may wish to exercise its discretion to strike the term pursuant to section 1385 rather than have it run consecutively, as we explain further in this part.

conviction of the primary offense, the imposition of the enhancement shall be stayed pending imposition of the sentence for the primary offense.'" (Smith, at p. 935; see section 12022.1, subd. (d).)

Because defendant's and the People's sole basis for challenging the sufficiency of the evidence to support the section 12022.1 enhancement is lack of proof of the primary offense, and because proof of the primary offense is irrelevant to a finding of the truth of the enhancement, the contention is rejected. However, this does not end the matter.

"[W]hen, as here, the secondary felony offense is adjudicated first and an on-bail enhancement is proved, the secondary-offense court may . . . (1) . . . stay 'imposition of the enhancement.' If the court follows that course, the enhancement is not imposed as a part of the defendant's sentence but is preserved until after the primary-offense court has rendered judgment on a felony conviction in that court, at which time the secondary-offense court . . . may either impose the enhancement or strike it pursuant to section 1385.

(2) Alternatively, . . . [i]f the [secondary] court determines to *impose* the enhancement, it may do so, but it also must stay execution of that aspect of the sentence, pending resolution of the prosecution of the primary offense. If the court imposes the enhancement and stays its execution, that aspect of the imposed sentence becomes effective immediately upon the primary-offense court's order lifting the stay after the defendant has

been convicted of the primary felony offense.” (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149 (*Meloney*)).

Since, contrary to section 12022.1, the trial court imposed a concurrent two-year term for the enhancement, we shall strike the punishment and afford the trial court on remand the opportunity to exercise its discretion to strike the enhancement if it so chooses.

Right to Jury Trial on Section 12022.1 Enhancement⁸

In *Apprendi, supra*, 530 U.S. 466, the court stated: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490.)

The California Supreme Court has “rejected a narrow or literal application of the [United States Supreme Court’s] reference to ‘the fact of a prior conviction.’” (*People v. Towne* (2008) 44 Cal.4th 63, 79 (*Towne*)). In *Towne*, the court held that the aggravating circumstances that a defendant “served a prior prison term” (Cal. Rules of Court, rule 4.421(b)(3); further references to rule sections are to the Cal. Rules of Court), “was on probation or parole when the crime was committed” (rule 4.421(b)(4)), or whose “prior performance on probation or parole was unsatisfactory” (rule 4.421(b)(5)) may

⁸ The People’s brief is of little aid on this issue because it relies on cases prior to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*).

be determined by a judge rather than a jury. (*Towne*, at pp. 70-71.)⁹ In *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), the court held that, consistent with *Apprendi*, a trial court may determine whether a prior conviction qualified as a conviction of a serious felony. (*McGee*, at p. 706.) In *People v. Black* (2007) 41 Cal.4th 799 (*Black*), the court held that the trial court, not the jury, decides whether a defendant's prior convictions are numerous and of increasing seriousness (rule 4.421(b)(2)). (*Black*, at pp. 818-820.)¹⁰

Similarly, the appellate court in *People v. Thomas* (2001) 91 Cal.App.4th 212 (*Thomas*) held that the court, not a jury, determines whether a defendant has served a prior prison term within the meaning of section 667.5, subdivision (b). (*Thomas*, at pp. 220-223.) *Thomas* was cited with approval in *Black*, *supra*, 41 Cal.4th at page 819; *Towne*, *supra*, 44 Cal.4th at pages 79-80; and *McGee*, *supra*, 38 Cal.4th at pages 700-702.

The bases for the above holdings were, in general, that the aggravating factors were all related to "the fact of a prior conviction" by their recidivistic nature, rather than to the conduct involved in the charged offense(s), and that such

⁹ As to the latter factor, the court limited its holding to determinations made only "based upon the defendant's record of one or more prior convictions." (*Towne*, *supra*, 44 Cal.4th at pp. 70-71.)

¹⁰ The California Rules of Court "have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions." [Citation.]" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.)

factors could be proven by reliable documentation, such as court records. (See *Towne, supra*, 44 Cal.4th at pp. 75-80; *McGee, supra*, 38 Cal.4th at pp. 708-709; *Black, supra*, 41 Cal.4th at pp. 818-820; *Thomas, supra*, 91 Cal.App.4th at pp. 222-223.)

Section 12022.1 is a recidivist statute -- it enhances punishment based upon the defendant's commission of another offense while on bail for a previous offense. (*People v. Walker* (2002) 29 Cal.4th 577, 589 ["a section 12022.1 enhancement turns on the status of a defendant as a repeat offender, not on what the defendant did when committing the current crime, i.e., secondary offense"].)

The only difference between a defendant who commits a felony offense while on probation or parole and a defendant who commits a felony offense while on bail for another felony offense is the timing. In the former circumstance, the prior conviction (primary offense) has already occurred. The distinction is insignificant because in the latter circumstance the defendant cannot be punished until he is convicted of the primary offense. Of course, in both circumstances, additional punishment requires a conviction of the second charged offense.

Because section 12022.1 is an enhancement statute that, like the foregoing examples, penalizes recidivist conduct and does not relate to the commission of either the primary or

secondary offense, defendant is not entitled to a jury trial on its truth.¹¹

IV

Defendant contends the trial court was prohibited from using his prior adjudications incurred in juvenile court to sentence him under the "three strikes" law because he was not afforded a jury trial on their validity, thereby denying him due process and the right to a jury trial as provided by the Sixth and Fourteenth Amendments to the United States Constitution. Defendant recognizes that the California Supreme Court has rejected his position in *People v. Nguyen* (2009) 46 Cal.4th 1007, 1028. Relying on the dissenting opinion of Justice Kennard in *Nguyen*, defendant urges *Nguyen* was wrongly decided. We are bound by the majority opinion and therefore reject defendant's contention. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

Defendant's robbery convictions are affirmed. The true finding regarding the three prior strike conviction allegations is reversed and the sentences for the robberies are reversed.

¹¹ To the extent defendant's argument may be considered a claim that a jury right is statutory (§ 1170.1, subd. (e) ["All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact"]), his failure to object on that ground forfeits the issue for appeal (*People v. French* (2008) 43 Cal.4th 36, 46 ["The requirement of an express waiver applies to the constitutional right to a jury trial, but not to jury trial rights that are established only by statute"]).

The two-year concurrent sentence imposed pursuant to section 12022.1 is vacated and the court is directed to resentence defendant in accordance with the procedure set forth in *Meloney, supra*, 30 Cal.4th at page 1165. The matter is remanded to San Joaquin County Superior Court for trial on the strike conviction allegations, if requested by the People, and for resentencing on the robbery convictions. In all other respects the judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MAURO, J.